90-141

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BOBBY H. HARDEN - - - - - **Petitioner**

versus

BERIL HOOSIER - - - - - **Respondent**

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is this case appropriate for review by the Supreme Court on the advice of counsel claim of qualified immunity, where there is a factual issue concerning the truth of certain conversations between Petitioner and Respondent which formed part of the basis for the arrest by Petitioner of the Respondent?

2. Is this case appropriate for Supreme Court Review on application of the claim that the arrest by Petitioner of Respondent was "objectively reasonable" as a matter of law, where there is a factual issue concerning the truth of Petitioner's Affidavit submitted in support of an arrest warrant for Respondent?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statutory and Constitutional Provisions Involved	1
Statement of the Case	2–10
Conclusion	10–12
Certificate of Service	13

TABLE OF AUTHORITIES

Cases: PAGE

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 8
Anderson v. *Creighton*, 107 S.Ct. 3034 (1987) 8
Patzig v. *O'Neill*, 577 F.2d 842 (3rd Cir. 1978) 9
Patterson v. *Commonwealth*, Ky. App., 630 S.W. 2d 73 (1981) 9
Brinegar v. *U.S.*, 338 U.S. 1670 (1949) 9
Henry v. *U.S.*, 361 U.S. 98 (1959) 9
Malley v. *Briggs*, 475 U.S. 335 (1986) 9

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Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Sixth Circuit Court of Appeals. The foregoing decision reversed a Summary Judgment in favor of Defendant-Petitioner Harden, and remanded the matter for trial on the ground that genuine issues of material fact existed precluding the entry of Summary Judgment. This case is not appropriate for Supreme Court review for the reason that fact issues exist which, if resolved favorably to Respondent, would render moot the alleged basis for review advanced by Petitioner.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional clauses and statutes involved in this action are correctly set forth in Petitioner's Petition for Writ of Certiorari at pages 2-3.

STATEMENT OF THE CASE

A. Nature of the Case

This is a claim made by Respondent Beril Hoosier under the Civil Rights Act (42 U.S.C. Sec. 1983) for an arrest made without probable cause, subjecting Defendant-Petitioner Bobby H. Harden (Chief of the Taylor County, Kentucky, Metro Police) to liability. Plaintiff-Respondent contends that under any objective standard no reasonably competent police officer would have concluded that a warrant should issue based upon the facts known to Harden at the time (or which should have been known to Harden with any reasonable investigation) the warrant was issued for Hoosier's arrest.

B. Nature of the Proceedings

Following the filing of the Complaint, depositions were taken and interrogatories were addressed by all of the parties. Petitioner subsequently made motion for Summary Judgment on the theory that this action could not be maintained on the ground that the Petitioner was protected by the doctrine of qualified immunity. The District Court, after holding oral arguments, sustained the Motion. The Sixth Circuit Court of Appeals reversed and remanded the case to the District Court for further proceedings, holding that a genuine issue of material fact existed which precluded the entry of Summary Judgment. Petitioner's Petition for Rehearing was denied by Order entered April 18, 1990, and Petitioner now seeks this Court's discretionary review on Petition for Writ of Certiorari.

C. Statement of the Facts

Respondent is a farmer residing in Taylor County, Kentucky, near Campbellsville. In past years he had cul-

tivated government land leased from the Army Corps of Engineers in association with one Dennis Campbell. At some point during the fall of 1985, Petitioner Harden, Chief of the Taylor County Metro Police, became aware that some marijuana plants had been found growing along Stoner Creek on "government" land leased by some person from the Corps of Engineers. On September 18, 1985, Petitioner Harden obtained a warrant for the arrest of Respondent charging a violation of a state statute KRS 218A.140, specifically alleging that the Respondent was "manufacturing 27 plants of marijuana *in his cornfield* on Stoner Creek . . ." (emphasis added). The corn in question encompassed several hundred acres. No attempt whatever was made by Harden to determine ownership of the cornfield nor to determine who leased the land on which the marijuana plants were found.

Prior to the arrest there was a conversation between Respondent and Petitioner on a street in Campbellsville, Kentucky, concerning which a factual dispute exists. Because of the reliance of the District Court upon Petitioner's version of the conversation, it is important that the Supreme Court realize that each party to the conversation had diametrically opposed versions of its content. Harden testified in his deposition that Hoosier approached him and said, "I hear you found some marijuana on me." Harden also claims that Hoosier admitted that the land on which the marijuana was found was farmed by him. Hoosier denies this, and says that the actual conversation was that Hoosier asked Harden whether he had found some marijuana "on government ground." Hoosier denied admitting that the corn or the marijuana were his.

The case was thereafter submitted to the Taylor County grand jury, which refused to indict. The case was resub-

mitted subsequently to a second grand jury, and again the grand jury refused to indict.

On April 10, 1987, Respondent took the deposition of Petitioner, during which Harden testified to the facts that were in his possession *at the time* he obtained the warrant. Harden was specifically asked if he had any idea whose cornfield it was on which the marijuana was found, and Harden testified (p. 37):

> "I believe somebody had mentioned it could have belonged to Beril, but as far as me knowing for sure, I didn't."

Harden did not identify any particular person as the one who told him this information, and he could not point to any specific time or location during which this conversation supposedly may have taken place. It is clear that all Harden knew was that the corn "could have belonged" to Hoosier, but conversely it could have belonged to any other person just as easily. Harden then testified that judging from the physical viewing of the marijuana plants, "The person who had that corn had the marijuana." (p. 38). Harden then testified that the reason he thought the corn was Hoosier's at the time he took out the warrant was the conversation in Campbellsville that he had with Hoosier, about which the testimony of Harden and Hoosier is diametrically opposing and concerning which a genuine issue of fact exists as to who is telling the truth (p. 40).

We thus have from Harden's own testimony that he knew only two things about the corn at the time he swore out the warrant for Hoosier's arrest: (1) a vague conversation may have taken place with someone whose identity is unknown who said that the corn "could have belonged" to Hoosier, but Harden didn't know for sure, and (2) the

conversation with Hoosier during which Harden claims Hoosier admitted the corn was his. In addition, Harden claims that he believed that whoever planted the corn also planted the marijuana because the marijuana appeared to have been set rather than growing wild. Of course, this latter observation is logically flawed because anyone could have come onto the field after the corn was planted and planted marijuana under cover of darkness; just because someone plants corn does not mean that he also planted marijuana subsequently found in the field. At no time did Harden have any statements or testimony from any witness that Hoosier planted any marijuana.

The District Court in its Opinion (p. 6) recites evidence that Hoosier worked together with Dennis Campbell to grow corn on government land in Taylor County, and the persons jointly applied for crop insurance grown on government land. These facts were not known to Harden at the time the warrant was taken out and were improperly relied upon the District Court in its Opinion to support its issuing of Summary Judgment. A simple investigation by Harden into the leases on the government land along Stoner Creek would have revealed the land in question was not leased by Hoosier, but instead was leased by Dennis Campbell. Neither Dennis Campbell nor anyone else has been charged with growing the subject marijuana, to this day.

REASONS WHY REVIEW SHOULD BE DENIED

The "bottom line" issue in this case is simply whether the District Court improperly determined that no genuine issue of material fact existed and that Petitioner Harden was entitled to Judgment as a matter of law. The law and evidence are clear that Summary Judgment was not appro-

priate in this case, and the decision of the Sixth Circuit was correct in reversing and remanding for further proceedings.

Petitioner contends that this Court should adopt an "advice of counsel" defense on the facts of this case such that Petitioner should be clothed with immunity from civil liability. The facts before this Court in the present action are inappropriate for consideration of this issue because a factual issue exists concerning the truth of the alleged facts conveyed by Petitioner to the City Attorney (upon which information the City Attorney allegedly rendered his advice to seek a warrant for arrest).

There also is a genuine issue of fact concerning the content of the conversation between Hoosier and Harden in the City of Campbellsville, and if this fact question should be resolved by a jury in favor of the Respondent, it would necessarily lead to the conclusion that Harden misled the City Attorney, since Harden contends that Hoosier admitted that the marijuana was "found on me," which Hoosier denies. Another factual dispute exists concerning the truthfulness of the Affidavit submitted by Petitioner in his efforts to obtain a warrant for Respondent's arrest. The Affidavit recites that Respondent was growing marijuana "in his corn field on Stoner Creek," whereas the land on which the marijuana was found did not belong to Respondent at all, and no attempt whatever had been made by Petitioner to determine who owned or leased the land on which the marijuana plants were found.

The only evidence at all in this case connecting Hoosier with the marijuana found in the field was the fact that Hoosier (along with at least a half-dozen other people) had been in the field *once* when the corn was planted. The marijuana found by the police had not been planted along

with the rest of the field, and Harden admits this in his deposition (p. 20). There was no evidence at all linking Hoosier to the marijuana itself. Harden's claim of probable cause for taking out the warrant rests entirely upon the fact that some nebulous, unidentified person told him that Hoosier had been involved in planting the corn, and that the marijuana did not appear to have been growing wild; the foregoing together with the alleged conversation with Hoosier (concerning which the factual dispute exists) led Harden to take out the warrant.

Following the disputed conversation between the parties, Petitioner made no further investigation as to who owned or farmed the land along Stoner Creek. Instead, Harden related *his version* of the disputed conversation to the County Attorney, along with Harden's opinion that the marijuana had been planted rather than growing wild, and his opinion that whoever planted the corn planted the marijuana. Whether the foregoing "facts" presented to the County Attorney were truthful is a question for the trier of fact to resolve on remand.

Looking at the facts known to Harden at the time he swore to the Affidavit and took out the warrant, the best that can be said is that Harden knew that Hoosier may have assisted in some way in planting the *corn*. The same thing may be said of many other people in Taylor County, none of whom were arrested. Certainly a better case could have been made by Harden against Dennis Campbell, who held the lease on the property involved, and who was to benefit and retain *all the profits* from the sale of the corn at the harvest. None of the information developed after this suit was filed concerning sharing of the profits on various parcels of land, joint planting of corn, and fertilizing of the field was known to Harden at the time he took out the

warrant. All of this information developed subsequently and cannot be considered in reviewing the reasonableness of Harden's decision to swear to the false Affidavit and obtain a warrant.

Harden admitted that no charges were ever filed against any of the other individuals who were equally involved in the planting of the corn. Harden admitted that he knew of no witness who could testify that Hoosier planted any marijuana anywhere at all in Taylor County, much less on this particular field (Harden depo. p. 61).

Moreover, *Harden admits he made absolutely no investigation into determining ownership of the cornfield prior to swearing out his Affidavit in support of the warrant.* It would have taken Harden less than half an hour to walk over to the Corps of Engineers office in Campbellsville to find out who leased the property on which he says the marijuana field was found. The Affidavit of Harden is clearly false in that it alleges that Hoosier was cultivating marijuana in "his cornfield." There was no cause at all to believe that Hoosier had any connection whatever with the marijuana.

Petitioner relies upon *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982) as further explained in *Anderson* v. *Creighton,* 107 S.Ct. 3034 (1987), as requiring that the Complaint be dismissed on the basis that Harden was entitled to qualified immunity from a Civil Rights Act claim based upon his actions. These two decisions hold that acts or omissions of certain officials are protected as long as their actions are *objectively reasonable* in light of legal rules clearly established at the time the action of the police officer was taken. Conversely, however, where the police officer violates a clearly established constitutional principle, liability does lie and an action may be maintained; these clearly established

constitutional principles include arrest without probable cause. *Patzig* v. *O'Neill,* 577 F.2d 842 (3d Cir. 1978); *Patterson* v. *Commonwealth,* Ky. App., 630 S.W. 2d 73 (1981).

"Probable cause," as set forth in the Fourth Amendment to the Constitution, has been defined by the Supreme Court as those facts and circumstances known to a reasonably prudent police officer which would lead him to believe that a crime has been committed and the person to be arrested committed it. *Brinegar* v. *U.S.,* 338 U.S. 160 (1949); *Henry* v. *U.S.,* 361 U.S. 98 (1959). The question in this case is, therefore, whether Harden possessed as a matter of law from an objective standard sufficient evidence to constitute probable cause at the time of making his Affidavit to obtain the warrant for Hoosier's arrest. Harden did not have any such evidence in his possession.

It has been clearly established that the question of whether or not a police officer possesses probable cause to make an arrest is a jury question, rather than a question for the Court to determine as a matter of law. *Patzig* v. *O'Neill, supra,* at page 848.

The fact that an arrest or search is based on a warrant issued by magistrate, as here, does not automatically establish objective good faith on the part of the police officer who applied for the warant. Rather, the officer is liable where a "reasonably well-trained officer in defendant's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley* v. *Briggs,* 475 U.S. 335 (1986). The officer will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. *Id.* Here the Affidavit was not even true.

Under the objective viewpoint set forth in *Harlow,* the defendant must at least conduct a rudimentary investigation into the facts, which investigation must support an objective conclusion that probable cause exists to believe that the person arrested committed the crime. It is clear in this case that no reasonable investigation was even attempted by Harden prior to making the arrest and seeking the warrant. At the very least, a fact question exists as to the content of the conversation in Campbellsville between Harden and Hoosier, upon which Harden says he relied. It cannot be said as a matter of law that the information Harden says he knew and relied upon at the time of taking out the warrant constituted probable cause for making the arrest. This fact is amply demonstrated by the refusal of two separate grand juries to indict Hoosier on these charges, even with all of the evidence that was subsequently purportedly developed by Harden after the fact.

CONCLUSION

Even from the objective standpoint set forth in *Harlow* and *Creighton,* it cannot be said as a matter of law that Petitioner had probable cause to believe the contents of the Affidavit he swore to in support of the arrest warrant for Appellant. The question of whether or not a police officer has probable cause to make an arrest is a question for the jury, given the reliance by Harden in this case upon a disputed conversation concerning which a genuine issue of fact exists. A jury is entitled to determine the facts based upon their own hearing of the evidence.

The jury in this case could find from the evidence that Petitioner's Affidavit was false, and could also find that the disputed conversation between Petitioner and Respondent

did not contain any admission by Respondent that marijuana had been found on him, but rather that Respondent had only stated that he had heard Harden found some marijuana "on government ground." The jury could also find from the evidence that Petitioner had no probable cause to make the arrest or obtain the warrant. Because genuine issues of fact exist for jury determination, it is inappropriate for this court to grant a Writ of Certiorari at this stage of the proceedings. If the jury renders fact findings adverse to Petitioner, the questions presented by Petitioner for review would be rendered moot. Any decision by the Supreme Court would therefore be in the nature of an advisory opinion rather than a decision based upon an actual case and controversy on the issues presented for review. Accordingly, the Petition for Writ of Certiorari should be denied.

Recognition of an "advise of counsel" defense to police officers in these 42 U.S.C. Sec. 1983 actions would have the practical effect of extending prosecutorial immunity to every police officer in the country and would emasculate the deterrent effect of Sec. 1983 civil actions. Such a policy decision by this Court would undoubtedly lead to every police department establishing a procedure by which it *always* obtained the advice of the prosecuting attorney's office prior to obtaining a warrant, thus effectively immunizing its police officers from any civil liability irrespectively of the nature of their conduct. The "advice of

counsel" defense is not deserving of consideration by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari has been made by mailing copies to Mr. Lee Huddleston, Huddleston Brothers, P. O. Box 2130, 1032 College Street, Bowling Green, Ky. 42102-2130, and to Mr. Larry D. Noe, 321 East Broadway, Campbellsville, Ky. 42718 this 15th day of August, 1990.

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